IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 175

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

INLAND WATERWAYS CORPORATION, CARGILL, INCORPORATED, NORRIS GRAIN COMPANY, ET AL.,
Appellees.

BRIEF FOR THE ALTON RAILROAD COMPANY AND OTHER WESTERN CARRIERS, APPELLANTS.

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OPINIONS BELOW.

The opinion of the specially-constituted District Court (R. 1663), *Cargill, Incorporated, et al. v. United States, et al.*, is reported at 44 F. Sup. 368. The report of the Interstate Commerce Commission, Division 2 (R. 18), Investigation and Suspension Docket No. 4718, is published at 246 I. C. C. 353. The report of the Interstate Commerce Commission on reconsideration (R. 47), Investigation and Suspension Docket No. 4718, is published at 248 I. C. C. 307.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

a. Nature of the Case.

The tariffs of the eastern carriers operating between Chicago and other points in Official Territory (between Chicago and New York, for example) for several years have permitted the application of rail proportional rates to the transportation by rail of grain from Chicago which earlier had arrived in Chicago by Illinois River barges. By tariffs filed with the Commission to become effective December 15, 1939, and later dates, the eastern carriers sought to cancel this application. Upon protest, the Commission entered an order (R. 15) October 14, 1939, suspending the operation of the newly filed tariffs and providing for a hearing concerning the lawfulness thereof. Following the hearing the Commission on December 1, 1941, entered an order (R. 77) vacating its previous suspension order and discontinuing the proceeding.

Some of the Appellees filed their complaints (R. 1, 133) in the District Court seeking to have the Commission's order, by which it vacated its previous suspension and discontinued the proceeding, set aside. The prayers were that upon final hearing a decree be entered by the Court perpetually enjoining and setting aside the operation and effect of said order, and enjoining the carrier defendants from making effective said change in tariffs.

After hearing, the specially-constituted (three-judge) District Court entered a final decree (R. 1677) annulling and setting aside the order (R. 77) of the Commission which vacated its earlier suspension order. (R. 15.) The final decree of the District Court also perpetually enjoined the Baltimore & Ohio Railroad Company and other eastern carriers, parties to the tariffs, from acting upon the sup-

posed authority of the Commission's order thereby annulled and set aside.

b. Date of the Final Decree to Be Reviewed.

This is an appeal from the final decree (R. 1677) entered by the specially-constituted (three-judge) District Court on April 16, 1942.

c. Statutory Provisions Believed to Sustain Jurisdiction.

The jurisdiction of this Court is invoked under U. S. C., Title 28, Sections 47a, 41(28), 44, 47 and 345.

d. Cases Sustaining the Jurisdiction of This Court on Appeal.

United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 294 U. S. 499.

United States v. Baltimore & Ohio Railroad Company, 293 U. S. 454.

Florida v. United States, 282 U. S. 194.

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Hudson & Manhattan R. Co. v. United States, 313 U. S. 98.

Interstate Commerce Commission v. Railway Labor Executives Association, 315 U. S. 373.

e. Probable Jurisdiction Was Noted by This Court on October 12, 1942.

STATEMENT.

The discussion in this brief is for the purpose of emphasizing not only that the lower court, by its final decree (R. 1677) under review on this appeal, has decided administrative issues on the merits the final determination of which Congress has confided to the Commission exclusively, but that also action by the Commission prior to complete administrative adjudication is not reviewable by the courts and that the lower court did not have jurisdiction to entertain the controversy until the administrative remedies had been exhausted.

The great bulk of the grain, almost altogether corn, which comes to Chicago by barge on the Illinois River and ultimately moves to eastern points by rail, originates in the territory around Morris, Illinois, a point on the Illinois River some 60 miles west of Chicago. Upon arrival in Chicago the grain is stored in elevators and later is shipped out when demand arises.

The rail service portion of the so-called barge-rail movement begins at Chicago. There is no consignment through to a destination beyond Chicago. The ultimate consignee and destination of all or any part of a particular barge load are unknown at the time of shipment.

The all-rail rates on grain and other commodities moving from western to eastern points grade down as the distance and service decrease. In this respect the following all-rail rates per 100 pounds are illustrative of the grain-rate adjustment:

From	To New York. All-rail local rates on corn (domestic).
Morris, Ill. (Ex. 5, R. 35)	35.5¢
Chicago (Ex. 5, R. 35)	34.5¢
South Bend, Ind. (Ex. 5, R. 36)	33.0¢
Ft. Wayne, Ind. (Ex. 5, R. 36)	30.0¢
Glenwood, Ind. (just west of Ohio State line, R. 516)	30.0¢
Payne, Ohio (Ex. 5, R. 36)	28.0¢
Lima, Ohio (Ex. 5, R. 36)	26.0¢

The proportional rate on grain to New York from Chicago is 26 cents. (Ex. 8, R. 41.) This proportional rate, in principle, is typical of other such rates from Chicago to eastern points generally. The eastern carriers had permitted the 26-cent proportional rate, in lieu of the 34½-cent local rate, to be applied on grain shipments from Chicago which, at an earlier date, had arrived in Chicago by river barge. By paying the 2.75-cent barge rate to Chicago from Morris and the 26-cent proportional rate to New York from Chicago, the through barge-rail rate by way of Chicago from Morris to New York became 28.75 cents. (R. 47, 53—Report of the Commission on Reconsideration, 248 I. C. C. 307, 310.) The eastern carriers, by filing the suspended tariffs, undertook to cancel the application of their eastbound proportional rates to the transportation of grain from Chicago which previously had arrived in Chicago by river barge.

The report of the Commission by Division 2 (R. 18) and the report of the Commission on reconsideration (R. 47) are made parts of the order (R. 77) lifting the suspension. In the former report, 246 I. C. C. 353, 380, the Commission said that the use of the proportional rates east of Chicago, in combination with the inbound barge rates to make through barge-rail rates, already had broken down a por-

tion of the Illinois grain-rate structure to Chicago and that an imminent break-down of the grain-rate structure east of Chicago also was indicated by the evidence.

To New York, for example, from Chicago the local rate is 34½ cents and from Ft. Wayne, Indiana, the local rate is 30 cents. The local rates from stations between Chicago and Ft. Wayne range from 34½ cents down to 30 cents. From Morris, Illinois, some 60 miles west of Chicago, the local rate is 35½ cents, or 1 cent higher than the Chicago rate.

The 35½-cent rail rate to New York from Morris is not stated in the tariffs as a joint one-factor rate, nor are the rates generally from other points west of Chicago to the east set out in the tariffs as joint one-factor rates. The 35½-cent rate to New York from Morris is a combination rate made up of a 9½-cent rate to Chicago from Morris and a 26 cent proportional rate from Chicago. The 9½-cent rate is stated separately in the tariffs and the 26-cent rate also is stated separately in the tariffs.

The rates from western points generally to New York and to other eastern points are combinations of the separately published proportional rates from Chicago, or from some other such gateway, and the separately published inbound rates to the gateway.

A rail proportional rate, although separately stated, is published to be used in combination as a proportion, part or balance of the through rail rate. The measure or size of a rail proportional rate, either when determined by the carriers or prescribed by the Commission, should be such that, with the measure or size of the inbound rail rate in mind, the resulting through combination rate from origin to final destination will be reasonable, non-discriminatory, non-prejudicial and otherwise comply with the requirements of the Act. (Report of the Commission on Reconsideration, R. 47—248 I. C. C. 307, 311.)

The measure or size of each rail proportional rate from Chicago to the east thus was determined by the carriers or prescribed by the Commission in relation to the measure or size of the inbound rail rates to Chicago. In so determining or prescribing the measure of the rail proportional rates, the measure of the inbound barge rates was not considered because a reasonable non-discriminatory combination barge-rail rate was not the objective.

By the indulgence of the eastern carriers in the practice of permitting the use of the rail proportional rate in combination with the inbound barge rate, the through barge-rail combination rate to New York from Morris was and, because of the lower court's decree, continues to be 28.75 cents. This is considerably less than the corresponding all-rail rate of 35½ cents to New York from Morris.

The real vice, however, in the practice of combining the rail proportional rate from Chicago with an inbound barge rate from Morris to make a through barge-rail rate to New York, for example, is that the resulting through barge-rail rate of 28.75 cents from Morris, a point some 60 miles west of Chicago, is less than the 30-cent rate which the shipper at Ft. Wayne is required to pay, and Ft. Wayne is some 150 miles east of Chicago.

By condoning the practice of arriving at combination rates on barge-rail shipments to New York for export, the combination barge-rail rate from Morris was and continues to be less than the rates required to be paid by shippers located at points east of the Ohio-Indiana State line. (R. 18—Report of the Commission, by Division 2, 246 I. C. C. 353, 374.)

Moreover, the points east of Chicago referred to above, which have rates to New York in excess of the sum of the barge rate from Morris to Chicago and the proportional rate from Chicago to New York, are points intermediate between Chicago and New York, that is, they are points on

rail routes over which the proportional rates from Chicago apply, and they are points through which barge-rail shipments from Morris to New York pass on their way to destination.

Ft. Wayne is on the route of the Pennsylvania Railroad between Chicago and New York. The 26-cent proportional rate to New York from Chicago applies over this route. A Pennsylvania freight train handling grain to New York out of Chicago elevators which theretofore had moved from Morris to Chicago by river barge might pick up grain shipments at Ft. Wayne for the same destination. The Ft. Wayne shipments would pay 30 cents while the barge shipments from Morris, by reason of the unwarranted barge-rail combination, would pay but 28.75 cents. In other words, for 28.75 cents the barge-rail shipments from Morris would receive from Ft. Wayne, a 30-cent rate point, not only the same rail service accorded the Ft. Wayne shipments but, in addition, rail service from Chicago as far as Ft. Wayne and barge service from Morris as far as Chicago.

Tariffs permitting a practice resulting in such inequalities should be changed. The eastern carriers sought to abolish the practice by filing the tariffs in question. In the exercise of its suspension power, the Commission held the schedules in abeyance temporarily, but thereafter revoked its suspension.

In the report by Division 2 (R. 18) and in the report on reconsideration (R. 47), both made parts of the order lifting the suspension (R. 77), the Commission took cognizance of the inequalities in the rate adjustment created by permitting the application of the proportional rates from Chicago in combination with barge rates to Chicago. In this connection, pertinent excerpts from the Commission's reports are set out in the appendix hereto at pages 23 and 24.

SPECIFICATION OF ERRORS.

(1) The District Court erred in annulling and setting aside the Commission's order, in enjoining the operation and effect thereof and in enjoining the eastern carriers from acting upon the authority of said order.

(2) The Court erred in assuming authority to review and set aside the order of the Commission.

(3) The Court erred in assuming that the Commission's order is one the judicial review of which is authorized.

(4) If the jurisdiction of the Court to review is upheld, the Court erred in substituting its judgment for that of the Commission and in not finding that the Commission's determination of the issues before it is final.

SUMMARY OF ARGUMENT.

The Order of the Commission Which the Lower Court Has Reviewed and Set Aside Is Not an Order the Review of Which Is Authorized.

I.

Whether or not the operation of tariffs, when filed, shall be suspended before taking effect is within the Commission's administrative discretion, and the exercise by the Commission of its administrative discretion, either in suspending the tariffs or permitting them to take effect over protest, admittedly is not subject to judicial review because either suspension or failure to suspend is the exercise of the Commission's administrative discretion and because if not suspended although protested, the Act provides for the filing of formal complaints by aggrieved parties to be followed to a conclusion before there is any finality to administrative adjudication.

II.

When the Commission at first suspends tariffs in the exercise of its administrative discretion it has authority, also in the exercise of administrative discretion, to lift the suspension and permit the tariffs to become operative. By the exercise of its administrative discretion in the latter instance the Commission does no more than place the parties in the same position they would have been in, except for lapse of time, had not the tariffs been suspended in the beginning. The lifting of the suspension is not the conclusion of the prescribed administrative procedure to any greater extent than is the failure of the Commission to suspend tariffs before becoming effective. If the tariffs are not suspended before becoming operative the courts may not be invoked, and the only recourse for aggrieved parties is a procedure before the Commission by formal complaint under Sections 13 and 15 of the Act. If the tariffs are suspended before becoming operative and the Commission subsequently lifts the suspension, parties claiming to be aggrieved thereby are in the same position they would have been in had no suspension order been entered, and in such circumstances the Act contemplates the pursuit of the same administrative remedies.

III.

In the present case appellees did not show that, on barge grain moving to New York from Chicago, they were entitled to have applied a rate as low as 26 cents, which is the rate they demanded. But the Commission did not consider that appellees had exhausted their administrative remedies to obtain the relief to which they might show themselves entitled "in a proper proceeding." In this connection, the Commission said:

> "It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper

proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." (R. 47, 55—Report of the Commission on Reconsideration, 248 I. C. C. 397, 311.)

IV.

An order of the Commission in a suspension case by which it lifts the suspension and discontinues a proceeding is the exercise of its administrative discretion not to interfere in that proceeding with the right of carriers to initiate rates although, immediately after becoming effective, the new rates might be successfully attacked before the Commission. While an order lifting a previous suspension and discontinuing the proceeding is not an order prescribing rates, even an order prescribing rates is not *res judicata*.

V.

The Commission's order lifting a suspension does not grant the carriers the right to file new rates. The statute is the source of the right to initiate rates by filing tariffs. The order is one which neither commands any party to do or refrain from doing anything. It does not finally determine any right or obligation. Parties not satisfied with the new rates have not been deprived of any right. They may secure the full relief to which they can show themselves entitled by pursuing prescribed administrative remedies.

Even If Courts Have Jurisdiction Over an Order Vacating a Suspension and Discontinuing the Proceeding, the Commission's Determination of the Issues Before It in the Present Case Is Final and Beyond the Authority of the Lower Court to Disturb.

ARGUMENT.

Congress, by the Urgent Deficiencies Act as construed by this Court, did not confer jurisdiction in a specially-constituted District Court to annul and set aside an order of the Interstate Commerce Commission vacating an earlier suspension order which the Commission itself had entered.

The administrative procedure before the Commission as prescribed in the Interstate Commerce Act.

The Interstate Commerce Act, Part I (U. S. C., Title 49, outlines the procedure to obtain administrative adjudication of issues over which the Commission has jurisdiction. By Sections 13(1) and 15(1) thereof (U. S. C., Title 49, Secs. 13 and 15) it is provided that any person complaining of anything done or omitted to be done by a common carrier in contravention of the provisions of the Act may apply to the Commission by complaint, and that if the Commission, after hearing, finds that any rate, regulation or practice is in violation of any provisions of the Act, it is authorized and empowered to determine and prescribe the rate, regulation or practice to be thereafter observed.

The Commission has primary jurisdiction of questions relating to the unreasonableness or to the preferential or discriminatory character of rates, regulations and practices of common carriers. Such questions must first be passed upon by the Commission before a court can be invoked. *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 139; *Sprout d. Son v. U. S.*, 281 U. S. 249, 258, 259.

Section 6(3) of the Act (U. S. C., Title 49, sec. 6(3)) recognizes the right of carriers to change existing rates and to initiate new rates by filing tariffs, and provides that 30 days' notice must be given to the Commission and to the public of a proposed change or of a proposed new rate un-

less the Commission allows a shorter time. Prior to the date they are published to become effective, the new tariffs are subject to suspension and investigation under Section 15(7) of the Act. (U. S. C., Title 49, Sec. 15(7).) It is specifically provided that the suspension may not be for a longer period than seven months. The proposed rate is to take effect at the end of the seven months' period unless prior thereto the suspension has been lifted, or the proposed rate found not justified.

Whether new tariffs proposing to change rates shall be suspended before taking effect or permitted to take effect is within the Commission's administrative discretion. If the Commission does not suspend, the courts have no power to do so. *Director General* v. *Viscose Co.*, 254 U. S. 498; *Board* v. *Great Northern Railway*, 281 U. S. 412; *Algoma Coal & Coke Co.* v. *U. S.*, 11 Fed. Supp. 487, 495. In *Board v. Great Northern Railway, supra*, at page 429, this Court said:

> "Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation." Interstate Commerce Act, Sec. 15(7); 36 Stat. 552; 41 Stat. 486, 487. This power of suspension was entrusted to the Commission only."

Having administrative discretion to suspend new tariffs or permit them to become operative, the Commission, also in the exercise of administrative discretion, may discontinue its investigation under Section 15(7) and vacate the suspension. Had the Commission for any reason failed to suspend the tariffs in the present case but allowed them to take effect by operation of law, appellees would have had recourse to the Commission only, and by filing a formal complaint. After the Commission lifted its suspension and permitted the tariffs to become operative, appellees

were placed in the same position they would have been in had the tariffs been permitted to become operative without suspension. The lifting of the suspension and the discontinuance of the proceeding are not the conclusion of the prescribed administrative procedure to any greater extent than is the failure of the Commission to suspend tariffs before they become operative.

In 1910 the Act authorized the suspension of new tariffs for a period not exceeding ten months. The existing rates of course remained in effect during the suspension, although at the expiration of the ten months' period the proposed new rates might be found to have been justified with no means available to the carriers for recouping losses in revenue incurred in the interim. With this thought in mind the suspension period later was reduced to five months. (See Sharfman's, *The Interstate Commerce Commission*, Part I, page 202.) The present period of suspension is seven months. If Congress had intended that the courts should have authority to hold new tariffs in abeyance for an indefinite period following the expiration of the statutory seven months' suspension period, or for an indefinite period after the administrative body concludes the new tariffs should be permitted to become operative, specific provisions to that effect would be found in the Act.

On the contrary, Section 15(7) provides that if, after suspension, an order is not made by the Commission within the period of suspension, "the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period." When the Commission does not make an order within the period of suspension a court, under a mandatory provision of this character, is without authority to interfere and prevent new tariffs from going into effect at the end of the suspension period. If a court were authorized to interfere and prevent new tariffs from going into effect after the Commis-

sion has made an order which permits them to become operative, the authority would have been expressly declared by Congress.

Moreover, assumption by a court of authority to hold new tariffs in abeyance beyond the seven months' suspension period, or beyond the time the tariffs are permitted by the Commission to take effect, is inconsistent with the provisions of Section 15(7) requiring speedy and expeditious handling by the Commission of proceedings involving changes in rates, practices, etc.

Appellees have resorted to judicial remedies before pursuing prescribed administrative procedure to a conclusion.

There are many orders of the Commission which do not meet the requirements of reviewability and are not the type of order which Congress made subject to judicial review under the provisions of the Urgent Deficiencies Act. *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Fed. Power Comm'n. v. Edison Co.*, 304 U. S. 375, 384; *United States v. Los Angeles R. R.*, 273 U. S. 299, 309. In *Columbia Broadcasting System v. United States*, *supra*, at page 424, the Court said:

> "We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies."

It is a long settled rule of judicial administration that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Corp.*, 303 U. S. 41, 50.

When vacating its suspension order in the present case

the Commission did not "prescribe" any rates. Its order vacating the suspension was permissive only. If the tariffs had become effective without any suspension, the new rates would not be rates prescribed by the Commission but would be carrier-made rates, and the only recourse of aggrieved parties would be by filing a complaint with the Commission. In *Algoma Coal & Coke Co. v. United States*, 11 Fed. Sup. 487, the plaintiffs filed a complaint with the District Court to enjoin putting into effect increased rates which had been allowed by the Commission in *Emergency Freight Charges, 1935, Ex Parte No. 115*, 208 I. C. C. 4. With reference to the action of the Commission of which the plaintiffs complained, the Court said at page 494:

> "It prescribed no particular rates. It merely permitted the carriers to file new rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13 (49 USCA § 13). That is to say, the increased rates now complained of are carrier made rates and not Commission made rates."

Further on, at page 495, the Court said:

> "The plaintiffs have mistaken their remedy in the statutory scheme of railroad rate making. Their contention is that the Commission, without sufficient evidence or proper findings of fact, has determined or fixed particular rates for the plaintiffs' particular traffic. But this misconceives what the Commission has actually done. It was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all the railroads in the country. If the increased rates as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under sections 13 and 15 of the act (49 USCA §§ 13, 15) for individual relief, and for reparation orders under section 16(1) of the Act, 49 USCA § 16(1)."

Rates at first suspended but later permitted to take effect also are carrier-made rates and not rates prescribed by the Commission. Aggrieved parties have the same administrative remedy by complaint to the Commission which was available to them if the tariffs had not been suspended in the first instance. While an order lifting a previous suspension and discontinuing the proceeding is not an order prescribing rates, even an order prescribing rates is not *res judicata*. *Tagg Bros. v. United States*, 280 U. S. 420, 425. The prescribed administrative procedure was not followed through to a conclusion by appellees after the Commission, by its administrative action, vacated its earlier suspension order.

A District Court can take a case only when Congress has authorized that type of case to be taken. Under the statutory plan for judicial review, established by Congress in the provisions of the Urgent Deficiencies Act as construed by this Court, an order of the Commission must meet the requirements of reviewability to be within the jurisdiction of a District Court. An order of the Commission does not meet the requirements of reviewability if at the time it is entered administrative adjudication and the opportunity for administrative relief are still open, or if the prescribed administrative procedure has not been pursued to a conclusion.

The order of the Commission in the present case was entered before the administrative procedure had been completed, and before appellees had made any effort to obtain such administrative relief as in a proper proceeding they could show themselves reasonably to be entitled. It is not a reviewable order, and the lower court did not have jurisdiction to annul and set it aside.

Even If Courts Have Jurisdiction Over an Order Vacating a Suspension and Discontinuing the Proceeding, the Commission's Determination of the Issues Before It in the Present Case Is Final and Beyond the Authority of the Lower Court to Disturb.

The Commission's order (R. 15) suspending the new tariffs and defining the only question before it for consideration recited in part "It is ordered, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the regulations and practices stated in the said schedules contained in said tariffs, * * *" The ordering portion of the order (R. 77) under review by which the Commission lifted its suspension and discontinued the proceeding is as follows:

> "It is ordered, That the order heretofore entered in this proceeding, suspending the operation of the schedules enumerated and described in said order, be, and it is hereby, vacated and set aside as of December 22, 1941, and that this proceeding be discontinued."

Among other things, the evidence showed that, under existing rates, shipments of grain could be moved, for example, from Morris, Illinois, to Chicago by barge and later moved by rail to New York from Chicago for a combined rate of 28.75 cents, while the rate to New York on shipments originating at Chicago, an intermediate point between Morris and New York on the barge-rail route, is 34½ cents. It also was shown by the evidence that shipments of grain could be moved from Morris to Chicago by barge and later moved by rail to New York for a combined rate of 28.75 cents, while the rate to New York on shipments originating at Ft. Wayne, Indiana, an intermediate point between Morris and New York on the barge-rail route, is 30 cents. Shippers from Morris moving shipments by barge to Chicago and by rail from Chicago

to New York were shown not only to have a lower through rate than the rail rate applicable from Chicago to New York, but also to have a lower through rate than is required to be paid by shippers located at intermediate points on the barge-rail route beyond and east of Chicago as far as Ft. Wayne and as far as the Ohio-Indiana state line. (R. 36, 516.)

Such an indefensible rate adjustment is the result of the practice of permitting rail proportional rates to be applied for the rail service performed on barge-rail shipments. It is the result of the practice of permitting an illogical and inconsistent combination of rates to become applicable to the movement of barge-rail grain. Through rates for barge-rail shipments, to be in line with the through rates on all-rail shipments, were not in mind when the measure or size of the proportional rates was determined or prescribed.

The Commission was in sympathy with the effort of the eastern carriers to put a stop to this practice. To that end it vacated its suspension order and discontinued the proceeding. The position of appellees was that they were entitled to the low proportional rates on barge grain. With the level of other competitive rates in mind, it obviously is beyond all reason to apply the low proportional rates in combination with the barge rate to make a through charge on barge rail shipments, and no evidence exists which would justify the Commission or a court in approving such a practice.

If appellees are of opinion that they are entitled to have applied out of Chicago on barge-rail shipments proportional rates lower than the Chicago local rates but which would be higher than the present Chicago proportionals, or that they are entitled to have applied on barge-rail shipments joint barge-rail rates lower than the combination of the local rates and the barge rate but which would be

higher than the combination of the existing barge and proportional rates, they have their remedy by formal complaint. In this connection the Commission said at page 311 of its report on reconsideration, 248 I. C. C. 307 (R. 47, 55), that protestants' allegations could not be sustained in the investigation and suspension proceeding, "although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations."

The Commission was confronted with an indefensible rate adjustment with the eastern carriers sought to correct by proposing changes in certain of their rates. For reasons heretofore mentioned, the Commission could not approve the practice of applying rail proportional rates on barge shipments when such a practice in connection with the rates before it resulted in the gross inequalities and preferences disclosed by the evidence and when such a practice not only had broken down a portion of the grain-rate structure to Chicago but threatened an imminent breakdown of the grain-rate structure east of Chicago. There were parties, other than carriers, in favor of the proposed change as well as parties in opposition thereto. Those opposed and claiming they would suffer injury when the tariffs became effective were invited to lay their grievances before the Commission "in a proper proceeding." It is for the Commission to appraise the advantages and disadvantages of a proposed change in rates and to determine, from the standpoint of all competitive interests and from the standpoint of the carriers, whether the requirements of the Act will better be fulfilled by permitting the proposed changes to take effect or by suspending them permanently.

In *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, this Court had before it various orders entered by the Commission in its investigation of the western grain-rate structure. The Commission had

concluded that the rates through primary markets should be made on the combination of flat rates to and proportional rates from the markets. This conclusion affected some interests adversely and was to the advantage of other interests, but it was reached after weighing the prospective gains and hurts. In refusing to disturb the Commission's orders, this Court said at page 548:

> "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants."

The Commission's order discontinued the proceeding. By this order the Commission closed its investigation. The effect of the lower court's final decree is that the investigation which the Commission had closed is now open and pending, and the court has directed that the Commission reach an administrative conclusion therein different from the administrative conclusion reflected by the order which the court set aside. If the Commission is of the opinion that the nature of the proceeding, and the issues raised by the order instituting the investigation, are such that no other conclusion than the one reached is justified in that proceeding, any further action it takes will not be the result of exercising its own judgment. Further, by its final decree, the lower court directs that the proposed tariffs shall not be put into effect although Section 15(7) provides that if the proceeding before the Commission is not concluded within the suspension period the proposed tariffs "shall go into effect at the end of such period."

The Commission, with its experience and knowledge in

rate and transportation matters, is in a better position than a court to decide upon the kind of proceeding in which the rights of all parties best can be protected and in which full compliance with the provisions of the Act may be accomplished. Question of this character are for the Commission to pass upon in the exercise of its administrative powers and a court is not authorized to substitute its judgment for that of the Commission.

This Court should reverse the final decree of the lower court and remand the cause with directions to dismiss the complaints.

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December 16, 1942.

APPENDIX.

Excerpt from the Report of the Commission by Division 2 (R. 18—246 I. C. C. 353, 374):

"Although the fourth section of the act does not apply to unregulated water carriers, the evidence here shows that the application of the barge rates to Chicago plus the rail proportionals beyond bring about evasions of the principles rather than violations of that section. For example, such combinations result in lower through charges to the Atlantic seaboard than the local rail rates to the same destinations from intermediate origin points on: (1) Domestic grain from all points in central territory (Chicago and east) west of a line drawn from Bay City, Mich., through Jackson and Sturgis, Mich., and Kendallville, Fort Wayne, Marion, Westville, Indianapolis, Greensburg, Ind., to Aurora, Ind.; (2) export grain from all points in central territory (Chicago and east) west of a line drawn from Atkins, Mich., through Oxford, Ann Arbor, Hanover, and Pittsford Junction, Mich., and thence along the Ohio-Indiana State line to the Ohio River; and (3) export traffic of barley, corn, oats, rye, and wheat from all points in central territory (Chicago and east) west of a line drawn from Painesville through Lordstown to East Liverpool, Ohio."

Excerpt from the Report of the Commission on Reconsideration (R. 47—248 I. C. C. 307, 310, 311):

"To central territory, the barge-rail combinations, even under the proposed schedules, will still be generally lower than the all-rail rates. From Morris, Ill., a representative origin, via Chicago, to Indianapolis, Ind., Detroit, Mich., and Circleville, Ohio, the barge-rail combinations will be 1.75, 4.75, and 0.75 cents, respectively, lower than the all-rail rates.

To trunk-line territory, the in-bound barge movement represents a very small proportion of the total

haul. The distance from Morris to Chicago by river, 57.5 miles, plus 880 miles rail short line to New York is 937.5 miles. The water portion of the haul is but 6 percent. To this territory, the barge-rail combinations are far below the local rates from the reshipping points in contravention of the fourth-section rule, while the all-rail rates are in strict conformity with that rule. The present barge-rail combination from Morris via Chicago to New York is 28.75 cents (composed of the in-bound barge rate of 2.75 cents plus the out-bound proportional rail rate of 26 cents), or 5.75 cents lower than the 34.5-cent local rates from Chicago, while the all-rail rate from Morris is 35.5 cents (composed of the in-bound interstate rail rate of 9.5 cents plus the out-bound rate of 26 cents), or 1 cent higher than the local rate from Chicago." (Page 310.)

"As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates, and properly may vary according to the relative length and nature of the in-bound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations." (Page 311.)